genuine.[53] Even if the instrument is apparently on its face of no effect, yet if under the circumstances it may be apparently the basis of some liability, it may be the subject of the crime of uttering.[54]

Staunton, Va. CHARLES CURRY.

(To be continued.)

ATTACHMENTS AND INJUNCTIONS AGAINST NATIONAL BANKS.

I. ATTACHMENTS.

Section 5242 of the Revised Statutes of the United States is as follows:

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; *and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.*"

This section is a part of chapter 4, "Dissolution and Receivership" of National Banks, and is itself entitled in the margin "Transfers, when void." It is not a matter of surprise, therefore, that vigorous and, in some courts, successful, efforts have been made to apply the rule, *"noscitur a sociis,"* and confine the effect of this prohibition against the use of mesne process to suits against *insolvent* national banks. This was notably the case in *Raynor* v. Pacific National Bank,[1] where it was held that the proper construction of the section in question is that no attachment can be issued against a national banking association or its property, after it has committed an act of insolvency—the implication being that had the bank been solvent, the attachment would have been good.

[53] 2 Bish. N. Cr. L. sec. 605. [54] Anderson v. State, 20 Tex. App. 598.

[1] 93 N. Y. 371 (1883).

Per Rapallo, J: "The condition of the bank at the time of the attachment is the material point." Affirming directly this implication are *Robinson* v. *Bank;*[2] *Holmes* v. *Bank;*[3] while the general subject is treated in *First National Bank* v. *Colby;*[4] *Peoples Bank* v. *Mech. Bank;*[5] *Market Nat. Bank* v. *Pacific Nat. Bank.*[6] In *Central Nat. Bank* v. *Richland Nat. Bank,*[7] it had been distinctly held that an action against a national bank located in another State could not be commenced by attachment of its property in New York. This case will be considered later.

It will be noted that all of these decisions were rendered prior to 1883, in which year the Supreme Court of the United States passed upon the question in such a definite manner as practically to settle it, as well for the State courts as the Federal. The case was that of *Pacific Nat. Bank* v. *Mixter.*[8] The facts were briefly that the appellant bank became embarrassed in November, 1881, and so continued until March, 1882, when its doors were opened for business with the consent of the comptroller of the currency. At the date of its re-opening it was indebted to Mixter in the sum of $15,000. He brought suit in the United States Circuit Court for the District of Massachusetts and, upon some ground not stated in the opinion, attached money which the defendant bank had on deposit in another local bank. Upon the execution of the statutory bond, the attachment was dissolved. After this the bank closed its doors a second time, and in May, 1882, a receiver was appointed by the comptroller of the currency and at once took possession of the assets. He appeared in the attachment suit, and filed motions to discharge the attachment and to dismiss the suit. These motions were overruled and judgment rendered against the bank. A writ of error was applied for and allowed.

In addition to this, the receiver filed a bill in equity in the circuit court against Mixter and the sureties on the bonds given to dissolve the attachment, the object of which was to reduce to his possession the securities held by the sureties for their protection, and to restrain the attaching creditor from enforcing the attachment bond on the ground among others that the attachment was "unauthorized, illegal and void." This bill was dismissed by the circuit court, and the receiver appealed.

[2] 81 N. Y. 385, 37 Am. Rep. 508 (1880).
[3] 18 South Carolina 31, 44 Am. Rep. 558 (1882).
[4] 46 Ala. 435 (1871).
[5] 62 How. Prac. (N. Y.) 422 (1882).
[6] 64 How. Prac. 1 (1882).
[7] 52 How. Prac. 136 (1876).
[8] 124 U. S. 721.

The decision was in favor of the receiver, the court, while adjudging that the judgment in favor of Mixter be affirmed, nevertheless reversing the decree in the suit in equity, and remanding the cause with instructions to enter a decree setting aside and annulling the bonds given to dissolve the attachment and enjoining the judgment creditor from proceeding in any manner to enforce the judgment against the sureties. It is rather a matter of surprise that the lower court should have rendered the judgment and decree appealed from, with the inhibition denounced by the last clause of section 5242, quoted above, against the issuance of mesne process against national banks. We can account for it on the theory that the attachments were issued during the temporary period of solvency between November and March. Or, again, it may be accounted for on the theory that the attachments were sued out in actions in a Federal court, to which the *terms* of the statute do not apply.

The opinion was delivered by Mr. Chief Justice Waite, speaking for a unanimous court. A concise statement is given of the legislation upon the subject, overruling the contention that the amendment of 1873 (the last clause of section 5242) was not germane to the remainder of the section. The court then uses the following broad and unqualified language:

"But, however that may be, it is clear to our minds that, as it stood originally as a part of section 57 after 1873, and as it stands now in the Revised Statutes, *it* [the clause under consideration] *operates as a prohibition upon all attachments against national banks under the authority of the State courts.* That was evidently its purpose when first enacted, for then it was a part of a section which, while providing for suits in the courts of the United States or of the State, as the plaintiff might elect, declared in express terms that if the suit was begun in a State court no attachment should issue until after judgment. The form of its re-enactment in the Revised Statutes does not change its meaning in this particular. *It stands now, as it did originally, as the paramount law of the land that attachments shall not issue from State courts against national banks, and writes into all such attachment laws an exception in favor of national banks. Since the Act of 1873 all attachment laws of the State must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.*"

It was further held that although the prohibition does not in express terms refer to attachments in suits begun in Federal circuit courts, nevertheless as by section 915 of the Revised Statutes those courts must conform in common law causes to the practice of the State courts, and as, under section 5242, "all power of issuing at-

tachments before judgment against national banks has been eliminated from State statutes, there cannot be any laws of the State providing for such a remedy on which the circuit courts may act."

The court also affirmed a proposition not directly before it, though passed upon later by the Supreme Judicial Court of Massachusetts in a case which will be considered later, namely, that if the power of issuing attachments is by section 5242 taken away from State courts, so also is the power of issuing injunctions.

The effect of *Bank* v. *Mixter* soon became apparent in the rulings of the State and Federal courts. Thus the New York courts, which had construed section 5242 to apply only to insolvent banks,[9] held in *Bank of Montreal* v. *Fidelity Nat. Bank,*[10] that the exemption from attachment applied to national banks, whether solvent or insolvent.[11] The same judgment was pronounced in *Planters Loan & Savings Bank* v. *Berry;*[12] *Garner* v. *Bank* (C. C.),[13] and in *First Nat. Bank* v. *LaDue.*[14] A decision antedating but conforming to that in *Bank* v. *Mixter,* and affirming the constitutionality of section 5242, is *Chesapeake Bank* v. *First Nat. Bank.*[15]

The latest cases in which the statute is known to have been considered are those of *Willard Mfg. Co.* v. *Bank* and *Willard Mfg. Co.* v. *Tierney.*[16] In these the ruling in *Bank* v. *Mixter* was broadened by the Supreme Court of North Carolina. In the first case, plaintiff commenced an action against non-residents and attached certain cotton. A national bank *intervened,* claiming the cotton, whereupon plaintiff brought an action against the bank in which he again attached the cotton. It was held that a motion of the bank to dissolve the attachment should have been granted under Rev. Stat. U. S. sec. 5242. In the second case, the same facts were presented, except that plaintiff moved to consolidate the actions, while the bank moved to dismiss. Points of practice were principally considered, with the same general result as in the first case. See also *Russel* v. *Smith Grain Co.* (Miss.)[17] A phase of the law is presented in the case of *Morris* v. *Bank,*[18] where it is held that though the Act of Congress prohibits the issue of attachments out

[9] Cases supra.

[10] 49 Hun, 607, 1 N. Y. Supp. 852, affirmed in 112 N. Y. 667 (1889).

[11] It must be confessed, however, that an examination of these reports shows a very meagre basis for the syllabus.

[12] 91 Ga. 264 (1893).

[13] 66 Fed. 369 (1895).

[14] 39 Minn. 415 (1888).

[15] 40 Md. 269, 17 Am. Rep. 601 (1874).

[16] 41 S. E. 870 and 871 (June 10, 1902).

[17] 32 South. 288.

[18] 30 Ill. App. 54 (1889).

of State courts against national banks, this is a personal privilege, and the right to insist upon it may be waived by pleading the general issue.

II. Injunctions.

The law being as above stated as to attachments, it must follow that the same construction will be given the statute as to injunctions and "executions before judgment"—whatever they may be—in a word, to all mesne process. The leading case upon this branch of the subject is *Freeman Mfg. Co.* v. *Bank*,[19] in which the statute as a whole is so lucidly discussed as to render superfluous any original consideration in this connection.

Plaintiff filed a bill in equity against a solvent national bank to enjoin it from disposing of certain notes pledged to it, but without right and with notice. It was held that a State court has no power to issue a preliminary injunction against a national bank, and this provision of the statute (sec. 5242) is not repealed by U. S. Statutes July 12, 1882, sec. 4; March 3, 1887, sec. 4, or August 13, 1888, sec. 4.

Holmes, J., speaking for a unanimous court, gives a *résumé* of the legislation upon the subject, and, alluding to the contention that the latter or prohibitive clause of the statute was intended to be limited to insolvent banks, thus disposes of it:

"It cannot be limited in that way. *Pacific Nat. Bank* v. *Mixter* (20), 124 U. S. 721. There is nothing in the context to limit it in any other. The argument is only that it is unreasonable that Congress should go so far; that the presumable motive for the law was to prevent an important wheel of business being stopped, and that this motive could be satisfied by limiting the injunctions mentioned to such as would place the general assets of the bank beyond its control by mesne process having the effect of such an attachment.

"But such arguments are a very doubtful ground for giving words an unnatural construction. The words used are of unlimited scope. The limited interpretation gives them an unusual meaning. . . . The jurisdiction and the extent of the power to be exercised by State courts depend on the permission of the United States. The wrongs likely to be done by national banks are of a pecuniary nature, and the banks usually are amply able to make good any such damage which they may do, so that there is not the same necessity for preventive remedies that there is with individuals or with corporations, for whose solvency less stringent precautions are taken.

'It is true that one result of this act is to put an end to the special jurisdiction of the United States courts over national banks, and thus to end the power of citizens of the same State as the bank to get an injunction anywhere, while

[19] 160 Mass. 398 (1894).

it leaves that power to citizens of another State who have a right to sue in the Circuit Court by reason of their citizenship. *Pacific Nat. Bank* v. *Mixter*, 124 U. S. 721; *Petri* v. *Commercial Nat. Bank*, 142 U. S. 644 (1892). But this accidental advantage is not enough to effect our construction of the Act." [20]

In *Hower* v. *Weiss Malting and Elevator Co.*,[21] the Circuit Court of Appeals for the Second Circuit held that section 5242 of the Revised Statutes does not deprive the Federal circuit court of the power to enjoin a national bank or to continue, after removal, an injunction previously granted by a State court. An attempt was made to distinguish *Bank* v. *Mixter*, and the power to issue an injunction was asserted as "inherent in the original jurisdiction in equity which is conferred upon the circuit courts by section 629 of the Revised Statutes." The opinion upon this point, however, is brief and unsatisfactory. It is one of that by no means uncommon class of cases in which authorities substantially in conflict with the ruling are politely alleged by the court or the reporter to be "distinguished," when the more accurate designation is "disapproved" or "overruled." *Quoad* the point under consideration here, the facts of the two cases were in substance the same, and had *Hower* v. *Weiss* been carried to the Supreme Court of the United States, it would not have been difficult to foretell accurately its disposition of the decree of the lower court, "distinguishing" *Bank* v. *Mixter*.

The conclusion of the matter, upon the authorities cited, is simply that section 5242 is to be construed liberally, and without qualification, to mean what it expresses—that no attachment, injunction or execution shall be issued against such association or its property before final judgment in *any* suit, action or proceeding.

The law was "summarily comprehended" in the New York case of *Central Nat. Bank* v. *Richland Nat. Bank*,[22] Barrett, J., having stated that it is only where jurisdiction cannot be acquired without resort to an attachment that the power of Congress to inhibit, or rather to postpone, the use until final judgment of the provisional remedy, seems to be at all questionable, proceeds:

"The Court of Appeals did not deny this power in *Cooke* v. *State Nat. Bank*

[20] In the case last cited it was held that a national bank, located in one State, may bring suit against a citizen of another State, in the Circuit Court of the United States for the District wherein the defendant resides, by reason alone of diverse citizenship. The opinion of Mr. Chief Justice Fuller sets forth in detail the legislation passed upon.

[21] 55 Fed. 356 (1893).

[22] Supra. It is rather remarkable that this case is not referred to even by name in any of the New York decisions, supra, to an opposite effect.

of Boston.[23] It merely decided that it is not competent for Congress to deprive the State courts of *jurisdiction* in all actions against national banks, nor to restrict such jurisdiction to the Federal courts. The Supreme Court of the United States, however, in *Farmers' Bank* v. *Dearing*, 91 U. S. 29, asserted a power wid enough to deprive us of all jurisdiction over such corporations. 'The States can exercise no control over them,' says Mr. Justice Swayne, 'nor in any wise affect their operation, except in so far as Congress may see proper to permit.' Be that as it may, the decisions are unanimous as to the power to relieve national banks from garnishee process. 101 Mass. 240; 40 Md. 269; 11 Blatch. 102. 'The power to create, as was said in the *Farmers &c Bank* v. *Dearing* (*ubi supra*), 'carries with it the power to preserve;' and if Congress is of the opinion that the usefulness of these institutions is likely to be impaired by the tying up of their funds in distant States, pending a litigation, protection therefrom is a reasonable exercise of such power to preserve.''

Richmond, Va. GEORGE BRYAN.

[23] 52 N. Y. 96.